IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 631 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJUBHAI PUTANPRASAD TIWARI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
APPEAL THROUGH JAIL - MS RV ACHARYA for the Appellant.
MR HM PRACHCHHAK, APP, for the respondent-State.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 10/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant came to be convicted by learned Additional Sessions Judge, Kheda, Camping at Anand, for the offence of murder of Jagdish Bansidhar Prajapati, allegedly, committed around 3.00 P.M. on 19th August, 1997, in Rabarivas area of Anand, by judgment and order dated 5th June, 1999, rendered in Sessions Case No.299 of 1997. The Trial Court sentenced the appellant to undergo rigorous imprisonment for life and to pay a fine of Rs.500/-, in default, to undergo rigorous imprisonment for a further period of three months. Aggrieved by the said judgment and order, present appeal is preferred.

2. The case of the prosecution is that the appellant and deceased-Jagdish Bansidhar Prajapati were working together and were closely associated with each other. Both of them used to consume liquor together. It is the case of the prosecution that, on the day of the incident, the deceased had brought liquor and the appellant and the deceased consumed the same. While they were

discussing their mutual accounts, suddenly, a dispute arose between the two and, as a result, the appellant assaulted the deceased with an iron road, which was lying there. It transpires that, thereafter, the appellant went to a friend of his, who advised him to go to police. The appellant, therefore, went to police and made declaration about the incident. On the basis of that information, an offence was registered and investigation started. The police, after due investigation, having found material against the appellant, filed charge sheet against the appellant in the Court learned Judicial Magistrate, First Class, Anand. The learned J.M.F.C., in turn, committed the case to the Court of Sessions and Sessions Case No.299 of 1997 came to be registered. The Trial Court, after framing charge at Exhibit 3 and after the accused pleading not guilty to the charge, recorded conviction, as stated above. Hence, this appeal.

3. We have heard learned Advocate for the appellant and learned Additional Public Prosecutor for the respondent. We have gone through the record and proceedings.

4. Learned Advocate for the appellant submitted that the case against the appellant is founded on circumstantial evidence. There is no eye-witness to the incident. The appellant himself has gone to the police and made a declaration of the offence, on the basis of which the crime was registered. It was submitted that the appellant and the deceased were under the influence of alcohol. The incident occurred all of a sudden without premeditation and, on account of loss of self-control, the appellant inflicted blow with an iron road, which was lying near the place of incident. It was submitted that, even if the prosecution case is accepted at face value, the above aspects emerge. In this set of circumstances, it was submitted that the prosecution cannot be said to have proved a case of murder against the appellant. It was submitted that exception 4 of Section 300 of the Indian Penal Code would be applicable to the facts of the case with full force and, therefore, the conviction under Section 302 of I. P. C. may be set aside. The case would fall under Section 304 of I. P. C. and appropriate sentence, if awarded, would meet the ends of justice.

5. Learned Additional Public Prosecutor has opposed this

appeal. According to him, though the appellant was under influence of liquor, it would not attract the general exception contemplated under Section 85 of the Indian Penal Code. It was also submitted that the appellant was alleged to have given three blows with an iron road and, therefore, the Trial Court was justified in convicting him for the offence of murder. He submitted that the appeal, therefore, may be dismissed.

6. We have taken into consideration rival side contentions. We find that there is no direct evidence as regards the incident. The F.I.R. lodged by the accused-appellant himself cannot be gone into. But it is clear from deposition of Investigating Officer, Dineshchand Nanakchand Mishra (Exhibit 37) that the F.I.R. by the accused-appellant was taken by him and, on the basis of that F. I. R., he started investigation after registering the offence. He stated in his deposition that, he visited the place of offence, drew the Inquest Panchnama and recorded statements of Babusing, Ghemaji, etc. and then arrested the accused. From the place of offence, the dead body as well as two liquor stinking glasses and an iron rod stained with blood was recovered.

6.1 It transpires from depositions of P.W. 3-Prahladbhai Sultanrav Mistry (Exhibit 13) and P.W.4-Subhashbhai Laxmanbhai (Exhibit 14) that the deceased was working as a tile fitting contractor. It also transpires from the deposition of Prahladbhai Mistry that the appellant and the deceased had gone together to Gamadivad and he went to Jitodiya for work. As Jagdish did not turn up in the evening till 7 o' clock, they started inquiring about him and went to Lotiyabhagol. There, people had gathered at Rabarivad and he found that Jagdish was lying dead in the room of the appellant and that he was murdered. It also appears that the appellant was doing the work of tile polishing and there were disputes between the deceased and the appellant in respect of their work account. P.W.5-Gomjibhai Bansidhar (Exhibit 15), brother of the deceased also deposed to the same effect.

6.2 P.W.1-Ratanben Bhalabhai Rabari is examined at Exhibit 8. She did not support the prosecution case and was, therefore, declared hostile. But she admitted during cross-examination to the Public Prosecutor that she had stated before

police that on the day of the incident, at about 2.00 P.M., she had seen the appellant and the deceased in a drunken condition going into the room of the appellant, wherefrom the dead body was, ultimately, recovered. She also said that, thereafter, she had noticed the appellant alone leaving the room hurriedly and going towards Lotiyabhagol.

6.3 Dr. Vinay Prasana Khanapur is examined at Ex.9. He said that he had performed the postmortem and had noticed three injuries. The first injury was behind the right ear, the second was on the occipital region and the third was on the right eyebrow. There was a fracture corresponding to the second injury. The brain was damaged. The injures were ante-mortem and the death occurred because of those injuries, which were sufficient in ordinary course of nature to cause death.

6.4 The said doctor is again examined as P.W.12, at Exhibit 54, wherein he stated that he had examined the appellant and had noticed a suspected bite injury on left forearm. There was an injury on left index finger and he gave history of having been beaten by

the deceased. The doctor also deposed that the appellant's breath smelt of liquor, however, his speech was normal and had a steady gait and the retina was dilated.

7. From the above evidence, it is clear that, though there is no direct evidence to connect the appellant with the incident, there is a complete chain of circumstances which would connect him with the incident. There is clear and unassailable medical evidence that the deceased died a homicidal death. The deceased and the appellant were working in the same field and they had disputes on their mutual accounts. On the day of incident, witnesses have seen them together in the vicinity of the area, where the incident occurred. P.W.1-Ratanben stated that she had seen them going to the room of the appellant in a drunken condition and from that very room, the dead body was found. The said witness also stated that she had seen the appellant leaving the room hurriedly after some time. The appellant himself lodged the F. I. R. Though contents cannot be gone into, the factum of he having lodged the F.I.R. would be relevant. On the basis of that F.I.R., investigation was made. The Investigating Officer had gone to the place of

incident and found the dead body. The weapon used was also found containing blood stains.

7.1 It transpires that, though the appellant and the deceased had disputes about their accounts, they continued to work jointly and they had consumed liquor together. The fact that both of them had consumed liquor emerges from the evidence of not only P. W.1 but also the doctor, who deposed about the presence of alcohol in stomach of the deceased and the breath of the appellant smelting with alcohol, when he examined him. It also transpires that the appellant himself had sustained injury and he gave history of assault by the deceased. The above factors lead to a legitimate and necessary inference about involvement of the appellant in the incident.

7.2 These factors would also go to show that the incident occurred suddenly and there was no premeditation. The appellant and the deceased were under the influence of liquor and in that state, the incident occurred, where the appellant himself also sustained injury. The weapon, which was used, was a weapon

which was lying near the place of incident and handy. It is not a case that the weapon was kept by the appellant from the beginning. These circumstances lead us to infer that the incident occurred suddenly without premeditation. It also appears that there was a fight between the two and drunken as he was, the appellant assaulted the deceased in the heat of passion. There is no material to infer that the appellant acted in a cruel or unusual manner. Of course, three injuries were caused to the deceased with the weapon, but considering the circumstances in which the incident occurred, mainly, that it occurred suddenly, that there was also an assault on the appellant himself, where he sustained some injuries, and the fact that both the persons were under the influence of liquor, it cannot be said that infliction of three blows by the appellant was a cruel or unusual act. When an act is committed in the heat of passion, there is lack of sense of proportion and equilibrium of mind. Number of blows in such a situation may not always be so significant. In our opinion, therefore, in absence of any other material, the case would fall under exception 4 to Section 300 of I. P. C. and not within the definition of murder. The conviction recorded by the Trial Court for murder, therefore,

cannot be sustained. Accordingly, the conviction deserves to be altered from one under Section 302 of I. P. C. to one under Section 304, Part-II of I. P.C.

8. We have heard learned Advocate for the appellant as well as learned Additional Public Prosecutor on the question of quantum of punishment. It is indicated that the appellant is absconding since 24th January, 2004 and appropriate proceedings are initiated against him in that regard. Learned Advocate for the appellant is not aware about this fact. He has indicated that a sympathetic view may be taken as the appellant hails from a poor family and has no criminal antecedents.

9. We have taken into consideration the relevant aspects. It is true that the appellant is working as a tile polisher and has no criminal antecedents. It is also true that the incident occurred suddenly, but the incident has resulted into death of a human being. The appellant has inflicted three blows on the deceased with an iron rod and, therefore, in our opinion, ends of justice would require that he is ordered to undergo rigorous imprisonment for a

period of eight years with no change in the amount of fine imposed by the Trial Court.

10. The appeal is, therefore, partly allowed. The conviction of the appellant is altered from one under Section 302 I. P. C. to one under Section 304, Part-II of I. P. C. The appellant is ordered to undergo rigorous imprisonment for a period of eight years and also to pay a fine of Rs.500/-, in default, to undergo rigorous imprisonment for three months.

[A. L. DAVE, J.]

[BANKIM N. MEHTA, J.]

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